

Message Text

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C O N F I D E N T I A L STATE 012391

E.O. 11652: GDS

TAGS: CGEN, PFOR, GE, US

SUBJECT: US-GDR CONSULAR NEGOTIATIONS AND FRG CONCERNS

REF: (A) STATE 7052, (B) LONDON 00541 NOTAL)

1. BEGIN SUMMARY: PROBLEM OF INTERPRETATION OF NATIONALITY IN U.S.-GDR AGREEMENT AND RELATED FRG ASSERTION OF RIGHT TO PROVIDE CONSULAR PROTECTION TO ALL GERMANS IN U.S. ARE OF IMMEDIATE CONCERN TO DEPT. WE PARTICULARLY INTERESTED IN WAY IN WHICH UK IS HANDLING ISSUE AND ANY PLANS FRANCE MAY HAVE FOR DEALING WITH IT. END SUMMARY.

2. REGRED DEPT. UNABLE PROVIDE GUIDANCE REQUESTED REF (B) FOR 1/16 MEETING. FOR FURTHER DISCUSSION, FOLLOWING BACKGROUND SHOULD BE OF USE.

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3. FRG HAS EXPRESSED TO DEPT. ITS CONCERN ABOUT GERMAN NATIONALITY AND CONSULAR REPRESENTATION OF EAST GERMAN RESIDENTS ON SEVERAL OCCASIONS. IT REQUESTED THAT NO PROVISION BE INCLUDED IN THE U.S.-GDR

CONSULAR AGREEMENT WHICH WOULD MAKE THE LEGISLATION OF THE GDR THE SOLE CRITERION FOR CONSULAR JURISDICTION OVER THE GROUP OF PERSONS COVERED BY THAT TREATY. FRG HAS FURTHER SAID THAT QUOTE: IT WILL INSIST ON RETAINING CONSULAR JURISDICTION OVER ALL GERMANS IN THE USA AND ON FURTHER EXERCISING THAT JURISDICTION IN RESPECT OF ALL GERMANS WHO WISH TO APPLY TO THIS END TO THE MISSIONS OF THE FEDERAL REPUBLIC OF GERMANY. UNQUOTE IN ITS MOST RECENT APPROACH THE FRG EMBASSY HAS REASSERTED THAT ITS RIGHTS REGARDING PROTECTION OF ALL PERSONS WHO ARE GERMANS UNDER THE BASIC LAW (FRG CONSTITUTION) HAVE NOT BEEN AFFECTED BY US/GDR AGREEMENT ON ESTABLISHMENT OF DIPLOMATIC RELATIONS QUOTE SO THAT GERMAN NATIONALS CAN BE PROTECTED BY THE MISSIONS OF THE FRG WITHIN THE U.S. WITHOUT LIMITATIONS, AS THEY HAVE BEEN UP TO THE PRESENT TIME. THIS DOES OF COURSE INCLUDE GERMANS RESIDING WITHIN GDR TERRITORY, WHENEVER THEY WISH TO BE PROTECTED BY (FRG) MISSIONS. UNQUOTE. FURTHER, THE FRG REQUESTED THE U.S. TO SEE TO IT, BY ISSUING APPROPRIATE GUIDELINES IF NECESSARY, QUOTE THAT GERMANS FROM THE GDR ARE BROUGHT INTO CONTACT WITH A MISSION OF THE FRG, WHENEVER THEY EXPRESS A WISH TO THIS EXTENT. UNQUOTE (SIC) THE FRG HAS ALSO ASSERTED THAT A GERMAN QUOTE FROM THE GDR UNQUOTE WHO WISHED TO BE BROUGHT TOGETHER WITH AN FRG CONSULAR OFFICER QUOTE WOULD HAVE TO BE PROTECTED EXCLUSIVELY BY THE AUTHORITIES OF THE FRG UNQUOTE. WE HAVE BEEN ASKED IF WE SHARE THESE VIEWS AND TO PROVIDE QUOTE AN ORAL ASSURANCE, REFERRING TO THE MINUTES AGREED BETWEEN THE U.S. AND THE GDR, ESPECIALLY AS TO (THE FRG'S) UNLIMITED RIGHT TO PROVIDE CONSULAR PROTECTION TO THOSE INHABITANTS OF THE GDR WHO ARE ARRESTED IN U.S. TERRITORY AND WANT TO BE PROTECTED BY THE FRG. UNQUOTE.

4. FRG APPROACHES HAVE BEEN BASED ON ARTICLE 116(1) OF BASIC LAW (FRG CONSTITUTION), WHICH DEFINES
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GERMAN NATIONALITY, ON CONTINUATION OF AN UNDIVIDED GERMANY AS A LEGAL ENTITY, ON RELATED CONTINUATION OF GERMAN NATIONALITY, AND ON ASSERTED RIGHT OF ANY GERMAN TO DIPLOMATIC AND CONSULAR PROTECTION, BY FRG MISSIONS (AS PROVIDED FOR IN FRG LAWS). FRG HAS NOT RPT NOT EXPRESSLY INVOKED EARLIER U.S., UK, FRENCH DECLARATIONS, SUCH AS THAT CONTAINED IN FINAL ACT OF 1954 LONDON CONFERENCE TO EFFECT THAT FRG, AS ONLY FREELY ELECTED AND LEGITIMATELY CONSTITUTED GERMAN GOVERNMENT, IS ENTITLED TO SPEAK FOR GERMANY AS THE REPRESENTATIVE OF THE GERMAN PEOPLE IN INTERNATIONAL LAW. FRG HAS NEVER, TO OUR KNOWLEDGE, USED THE CONCEPT OF AN FRG NATIONALITY OR CITIZENSHIP IN ITS

INTERNAL LAWS, AND HAS DEFINED NOT ONLY RIGHT TO PROTECTION, BUT VOTING RIGHTS AND OTHER IMPORTANT MATTERS IN TERMS OF GERMAN NATIONALITY. TIED AS IT IS TO THE IDEA OF THE CONTINUATION OF GERMANY AS A WHOLE, THERE IS STILL CONSIDERABLE EMOTIONAL AND POLITICAL FREIGHT ATTACHED TO THIS CONCEPTUAL STRUCTURE.

5. DEPT. HAS NO PROBLEM WITH FRG REQUEST THAT U.S.-GDR TREATY NOT CONTAIN PROVISION THAT LEGISLATION OF GDR IS SOLE CRITERION OF CONSULAR JURISDICTION. U.S. CONSULAR AGREEMENTS DO NOT NORMALLY CONTAIN SUCH A PROVISION. ONLY IN LIMITED AREA OF DUAL SENDING STATE/RECEIVING STATE NATIONALITY HAVE WE SOUGHT PROVISIONS WHICH WOULD ALLOW SENDING STATE TO PROVIDE PROTECTION TO THE DUAL NATIONAL WHO ENTERED THE RECEIVING STATE DOCUMENTED AS SENDING STATE NATIONAL. U.S. DRAFT PROPOSAL ON THIS POINT PROVIDES: QUOTE THE PROVISIONS OF THIS ARTICLE (ON CONSULAR ACCESS) RELATING TO NATIONALS OF THE SENDING STATE SHALL LIKEWISE APPLY TO PERSONS WHO MAY ALSO BE CONSIDERED BY THE RECEIVING STATE TO BE NATIONALS OF THE RECEIVING STATE IF THE PERSON HAS ENTERED THE RECEIVING STATE ON THE BASIS OF A VALID SENDING STATE PASSPORT OR OTHER LAWFUL TRAVEL DOCUMENT OF THE SENDING STATE AND HAS RECEIVED FROM THE RECEIVING STATE A VALID ENTRY VISA OR OTHER APPROPRIATE DOCUMENT AUTHORIZING ENTRY INTO THE RECEIVING STATE. THE PROVISIONS OF THIS PARAGRAPH SHALL CONTINUE TO APPLY TO SUCH
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PERSONS EVEN THOUGH THE PERIOD FOR WHICH THEY HAVE BEEN AUTHORIZED TO REMAIN IN THE RECEIVING STATE HAS EXPIRED DUE TO THE PENDENCY OF JUDICIAL OR ADMINISTRATIVE PROCEEDINGS PREVENTING VOLUNTARY DEPARTURE. SUCH PERSONS SHALL ALSO BE PERMITTED TO LEAVE THE RECEIVING STATE WITHOUT THE NECESSITY OF OBTAINING FURTHER DOCUMENTATION FROM THE RECEIVING STATE. UNQUOTE FRG HAD OPPORTUNITY TO REVIEW THIS LANGUAGE PRIOR TO RECENT EXCHANGE OF CONSULAR AGREEMENT DRAFTS WITH GDR AND HAS NOT RAISED OBJECTION. GDR DRAFT CONTAINS FOLLOWING PROPOSED DEFINITION OF CITIZEN WHICH WE DO NOT INTEND TO ACCEPT: QUOTE CITIZENS OF THE SENDING STATE ARE THOSE PERSONS WHO HAVE ITS CITIZENSHIP PURSUANT TO THE LEGAL PROVISIONS OF THAT STATE. UNQUOTE AS A MATTER OF INTERNATIONAL PRACTICE, HOWEVER, SENDING STATE VIEW OF WHETHER AN INDIVIDUAL POSSESSES ITS CITIZENSHIP IS USUALLY DETERMINATIVE EXCEPT IN CASES OF CONFLICT WITH RECEIVING STATE'S OWN CITIZENSHIP CLAIM OR IN CASES WHEN SENDING STATE HAS INSUFFICIENT BASIS FOR ASSERTING CITIZENSHIP UNDER INTERNATIONAL LAW (E.G., WHERE SENDING STATE SEEKS TO IMPOSE CITIZENSHIP ON PERSON WITH NO GENUINE CONNECTION WITH SENDING STATE

WHO DOES NOT WISH TO ACCEPT THAT CITIZENSHIP). THEREFORE, EVEN WITHOUT EXPRESS PROVISION IN TREATY, GDR NATIONALITY OR CITIZENSHIP LAWS WILL PROBABLY BE DECISIVE IN MOST CASES WITH RESPECT TO GDR CONSULAR JURISDICTION.

6. OTHER FRG ASSERTIONS AND REQUESTS ARE POTENTIALLY MORE TROUBLESOME AND ARE UNDER STUDY. IT WOULD BE

EXTREMELY DIFFICULT TO AGREE THAT IN ALL CASES IN WHICH EAST GERMAN ASKS TO SEE FRG CONSULAR OFFICER, THAT PERSON FALLS WITHIN EXCLUSIVE RPT EXCLUSIVE CONSULAR PROTECTIVE JURISDICTION OF FRG. UNLESS AN EFFECTIVE RENUNCIATION OF GDR CITIZENSHIP WERE TO OCCUR, THAT PERSON WOULD STILL BE GDR CITIZEN FOR PURPOSES OF THE CONSULAR AGREEMENT, ALTHOUGH HE MIGHT IN ADDITION BE QUOTE GERMAN NATIONAL UNQUOTE. ONE MIGHT CONSIDER SOLVING THIS PROBLEM BY PRACTICAL DEVICE OF LIMITING GDR CONSULAR VISITATION AND OTHER COMMUNICATION RIGHTS TO THOSE GDR NATIONALS WHO REQUEST SUCH PROTECTION. HOWEVER, WE HAVE SOUGHT TO HAVE UNQUALIFIED RIGHT FOR CONFIDENTIAL

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OUR CONSULAR OFFICIALS TO GET TO ARRESTED AMERICANS IN EASTERN EUROPE WITHOUT GIVING RECEIVING STATE POTENTIAL EXCUSE OF SAYING THAT THAT CITIZEN DOES NOT WANT TO SEE US.

7. WE ALSO SEE DIFFICULTY WITH ASSERTION THAT FRG HAS QUOTE RIGHT UNQUOTE TO PROVIDE CONSULAR PROTECTION TO EAST GERMANS. FRG, WHILE PART OF GERMANY, IS NOT IDENTICAL TO THE GERMAN STATE. INTERNATIONAL LAW, PRACTICE AND OUR EXISTING AGREEMENTS WITH FRG, WHICH DEAL WITH CONSULAR PROTECTION IN TERMS OF THE CITIZENS OR NATIONALS OF THE SENDING STATE, DO NOT APPEAR TO ACCORD CONSULAR RIGHTS WITH REGARD TO ALL GERMAN NATIONALS, BUT ONLY THOSE WHOSE RELATIONSHIP TO FRG IS AKIN TO THAT OF RELATIONSHIP OF CITIZENS TO THEIR STATE EVEN IF FRG DOES NOT CHOOSE TO USE THESE TERMS. U.S. HAS VARIOUS AGREEMENTS IN FORCE WITH FRG WHICH PROVIDE RIGHTS FOR OR WITH RESPECT TO FRG NATIONALS, E.G., RIGHTS TO DO BUSINESS, AND USE OF TERM NATIONAL IN AN AGREEMENT WITH FRG CANNOT NORMALLY BE CONSTRUED TO MEAN EAST GERMANS WHO REMAIN RESIDENTS OF EAST GERMANY. U.S. HAS NOT HAD TO ADDRESS THIS QUESTION IN ANY GENERAL WAY IN PAST, SINCE WE HAVE NOT HAD CASES OF EAST GERMANS IN U.S. IN NEED OF CONSULAR PROTECTION IN CIRCUMSTANCES RAISING ISSUE OF FRG RIGHTS. WE HAVE HAD CASES OF THE FRG SEEKING TO PROVIDE CONSULAR REPRESENTATION IN PROBATE MATTERS FOR EAST GERMANS. IN PAST, WE HAVE TAKEN THE POSITION THAT FRG CONSULAR OFFICIALS QUOTE MAY REPRESENT IN THE UNITED STATES THE INTERESTS OF ALL GERMAN NATIONALS WHO HAVE CEASED TO BE RESIDENTS OF EAST GERMANY, IN THE SAME MANNER AS THEY MAY REPRESENT THE INTERESTS

OF GERMAN NATIONALS RESIDENT IN THE FEDERAL REPUBLIC.
THE DEPT. DOES NOT CONSIDER, HOWEVER, THAT CONSULAR
OFFICERS OF THE FEDERAL REPUBLIC OF GERMANY ARE ENTITLED,
AS A MATTER OF RIGHT AND BY VIRTUE OF THEIR OFFICIAL
POSITION, TO REPRESENT GERMAN NATIONALS PRESENTLY
RESIDENT IN THE SOVIET SECTOR OF BERLIN OR IN THE SO-CALLED

GERMAN DEMOCRATIC REPUBLIC, UNQUOTE THIS AND SOME
ADDITIONAL MATERIAL IS TO BE FOUND IN WHITEMAN'S
DIGEST OF INTERNATIONAL LAW, VOL. 7, PP. 686-687.
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8. ADDRESSEES MAY USE ABOVE MATERIAL IN DISCUSSIONS
WITH FRENCH AND BRITISH, ON APPROPRIATE CONFIDENTIAL
BASIS AND WITH CAVEAT THAT STUDY OF ISSUES RAISED BY FRG
IS NOT YET COMPLETE AND WE ARE SEEKING TO FIND WAYS
OF ACCOMMODATING FRG'S REAL NEEDS IN PRACTICAL WAYS.
WE WOULD BE INTERESTED IN BRITISH AND FRENCH EXPERIENCE
WITH AND POSITIONS ON FRG CONSULAR JURISDICTION
REGARDING EAST GERMANS, WHETHER FRG HAS MADE SIMILAR
REPRESENTATIONS TO THEM AND, IF SO, HOW THEY MIGHT
PLAN TO RESPOND. IN CASE OF UK, WE WOULD BE INTERESTED
AS WELL IN ANY GENERAL INFORMATION WHICH THEY MIGHT
PROVIDE ON THEIR NEGOTIATIONS WITH GDR, BOTH AS TO
SUBSTANCE AND ATMOSPHERICS WHICH MIGHT BE HELPFUL TO
US AS WE APPROACH THE START OF OUR OWN NEGOTIATIONS IN
FEBRUARY. KISSINGER

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